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No. 95-100

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

NTDEC, NINTENDO ELECTRONIC CO., LTD., JIMMY YAO, WANG WEN-FU, WANG SU-TANG, CHEN MEI-LIN and MEGA SOFT, INC.,

Petitioners,

v.

NINTENDO OF AMERICA, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

In their Petition For Writ of Certiorari, Petitioners challenged the $25 million+ default judgment on a number of grounds. First, the huge $25 million+ default was based upon improper alleged mail service which trampled over FRCP Rule 5(b) and *Bowers v. E.J. Rose Mfg.*, 149 F.2d 612 (9th Cir. 1945) and *U.S. v. Brandt*, 8 F.R.D. 163 (1948), and thwarted the district court's September 11, 1992 Order, requiring service on each Petitioner "in care of Henry Wong". The so-called mail service was not calculated to give, and did not give Petitioners notice, and conspicuously failed to comply

with the restrictive-and-most-exacting-compliance standard required under FRCP Rule 5(b) for mail service.[1]

The Petition also explained that both law and equity demanded that the exaggerated $25 million+ default judgment – against the Taiwanese Petitioners, who reside on the other side of the globe and who are unfamiliar with the language and judicial system operating in the United States – be set aside.

The Petition concluded by describing how the outrageous $25 million+ default judgment awarded against the absent Petitioners, without notice, was based upon a series of unsupported assumptions which resulted in a vastly exaggerated gross sales damages without any offset for the cost of producing the alleged infringing goods.[2] The vast, exaggerated figure was then trebled to arrive at a $25 million+ default judgment which had no basis in fact or law.

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[1] *Timmons v. United States*, 194 F.2d 357 (4th Cir. 1952)

[2] Applying zero costs to the assumed sales was squarely contradicted by the testimony at the prove-up hearing by Respondent's own expert, Mr. John Tintinger, a Technical Support specialist that:

> "it is very costly [to produce the infringing cartridges because they use] Mass ROM [and defendants also] need to produce the printed circuit boards and their housings and assemble all those together, so it's a fairly sophisticated process."

I. The Court Should Grant The Petition To Resolve The Question Whether The District Court Can Unilaterally Discard The Requirements Of FRCP 5(b) And Arbitrarily Apply A Penalty Of Excessive Damages Without Regard To The Petitioners' Due Process Rights.

The Petition was supported by citations to substantial case law authorities. In contrast, Respondent's Brief In Opposition to Petition For Writ of Certiorari fails to refute any of the authorities cited in the Petition. In fact, Respondent's Brief fails to cite or distinguish *any* authorities to even attempt to excuse Respondent's failure to comply with FRCP Rule 5(b) and the district court's September 11, 1992 Order. Instead, Respondent's Brief demands slavish adherence to the district court's ruling, based upon the unsupported claim that Petitioners deserve to be punished with a $25 million+ default judgment because they are allegedly "worldwide counterfeiters" and "willfully ignored" the district court action. By falsely labeling Petitioners as "counterfeiters", Respondents are apparently attempting to prejudice this Court against the Taiwanese Petitioners to get the court to overlook Respondent's violations of FRCP Rule 5(b), and the excessive default judgment.

Slavish adherence to the district court's ruling is contrary to law. This case must be judged on a non-deferential *de novo* standard of review of the district court's ruling. By the same token, because of the failure to serve Petitioners under Rule 5(b), Petitioners were never given the opportunity to respond to the action on any of the counterfeiting allegations. Thus, Respondent's one-sided factual claims should not be considered for

purposes of this Petition. Moreover, Respondent's counterfeiting claims, even if they were true, are irrelevant and legally insufficient to justify trampling on Petitioners' due process rights under FRCP Rule 5(b), and the cases which interpret it, e.g., *Bower v. E.J. Rose Mfg., supra,* and *U.S. v. Brandt, supra.* Without Respondent's strict compliance with FRCP Rule 5(b), the district court lacked jurisdiction to award the excessive $25 million+ default judgment, which amount was factually and legally excessive and constituted an unfair penalty to Petitioners and a windfall to Respondent.

CONCLUSION

For the foregoing reasons set forth in the Petition and herein, the Petition should be granted.

Respectfully submitted,

JAY I. LEE

Dated: September 13, 1995